Supreme Court, U.S.
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No. 78-1768

In the Supreme Court of the United States

OCTOBER TERM, 1978

SHIRLEY JEAN ROWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 594 F. 2d 98.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1978. The petition for a writ of certiorari was filed on May 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the money petitioner embezzled was money "of the United States," within the meaning of 18 U.S.C. 641.

2. Whether the district court, in determining petitioner's sentence, improperly considered her failure to admit guilt.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on four counts of embezzling funds of the United States, in violation of 18 U.S.C. 641. Petitioner was sentenced to concurrent terms of six months' imprisonment on two counts, and five years' probation on the other two counts. The court of appeals affirmed (Pet. App. A).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. 4453-4455), showed that petitioner was the head cashier at a community college in Texas. The college receives money from the Department of Health, Education, and Welfare, and, in turn, disburses these funds to students under the terms of the Basic Educational Opportunity Grant Program (BEOG). See 20 U.S.C. 1070 *et seq.* and 45 C.F.R. Part 190. An audit of the college's student aid program records revealed that four checks had been issued in the names of fictitious students and cashed at the college bookstore (Tr. 84-86, 93-94, 99-101, 198-201); there were no documents that would have justified their issuance (Tr. 12, 19-21, 25-26, 40-41, 142-143). Petitioner signed the check request forms that generated all four checks (Tr. 703-706), and a handwriting expert testified that petitioner definitely endorsed two of the checks (Tr. 643-644) and probably endorsed the other two (Tr. 655).

ARGUMENT

1. Petitioner asserts (Pet. 4-5) that the government failed to prove that she embezzled money "of the United States," within the meaning of 18 U.S.C. 641. This contention is without merit.

The college maintained a separate bank account for funds received under federal programs, including BEOG. Petitioner negotiated checks drawn on this account. Although the college administers the funds, the United States retains a high degree of control over the funds. Applicable regulations provide that all funds received under the BEOG program shall be handled through one identifiable account in accordance with generally accepted accounting procedures, and the account is subject to audit by federal officials. 45 C.F.R. 190.79(a). The regulations further provide that the participating colleges must hold the funds in trust. 45 C.F.R. 190.79(b). Theft or embezzlement of these funds is therefore properly punishable under 18 U.S.C. 641, because they "have a federal origin and a federal end, and during their outstanding circulation they are subject to extensive federal controls." *United States* v. *Evans*, 572 F. 2d 455, 474 (5th Cir.), cert. denied, No. 78-5068 (Oct. 2, 1978).

Petitioner argues, however, that the embezzled funds belonged to the college rather than the United States because (a) the lack of appropriate supporting documents means that the government will not reimburse the college for the particular checks cashed by petitioner, and (b) at the time the checks were cashed, the college had disbursed more money via BEOG checks that it had received from

the government under the BEOG program.[1] The short answer is that the checks cashed were payable from an account containing exclusively federal funds. Even though the ultimate burden of loss may fall on the college as trustee, it is clear that petitioner wrongfully obtained "money or [an]other thing of value of the United States." *United States* v. *Evans, supra; United States* v. *Maxwell*, 588 F. 2d 568 (7th Cir. 1978), cert. denied, No. 78-6118 (Apr. 16, 1979).

Petitioner maintains that *United States* v. *Collins*, 464 F. 2d 1163 (9th Cir. 1972), conflicts with the decision of the court below. In *Collins*, the defendant wrongfully obtained a warrant drawn on an account containing federal funds and successfully negotiated the warrant even though it was improperly endorsed. The court reasoned that the defendant had not stolen federal money because, under commercial law principles, a bank expends its own money, rather than that of the depositor, when it pays a draft bearing a forged endorsement. *Collins* is distinguishable from this case because the endorsements here were not forged; they were endorsements of fictitious students. Under Texas law, it is clear that "anyone, even a forger, can effectively endorse the name of a fictitious payee * * *," and a bank is not liable for paying a check so endorsed. *Aetna Life and Casualty Co.* v. *Hampton State Bank*, 497 S.W. 2d 80, 84 (Tex. Civ. App. 1973); see Tex. Bus. & Com. Code Ann. §3.405 (Vernon 1968).

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[1]Petitioner's statement (Pet. 4) that the account was overdrawn is misleading. The college deposited money from several federal programs into a single account, as permitted by the regulations (45 C.F.R. 190.79(a)), and the account contained sufficient funds to cover the checks in question. Thus, although petitioner obtained federal funds by means of forged BEOG checks, the funds used to pay them can be traced to federal programs.

2. Petitioner contends (Pet. 5) that the district court violated her Fifth Amendment due process rights by considering her failure to admit guilt in determining her sentence. The court of appeals properly rejected this argument, as has every other federal appellate panel confronted with such a claim after this Court's decision in *United States* v. *Grayson*, 438 U.S. 41 (1978). See *United States* v. *Miller*, 589 F. 2d 1117 (1st Cir. 1978), cert. denied, No. 78-966 (Mar. 19, 1979); *United States* v. *Santiago*, 582 F. 2d 1128 (7th Cir. 1978); *United States* v. *Richardson*, 582 F. 2d 968 (5th Cir. 1978).

Grayson held that a sentencing judge does not violate a defendant's due process rights when he adjusts the sentence imposed to reflect his belief that the defendant lied while testifying in his own behalf at trial. The Court stated (438 U.S. at 50, 53):

> A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing. * * *
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> [I]t is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision.

Similar reasoning supports the court of appeals' decision in this case. The pertinent portion of the colloquy between petitioner, her counsel, and the sentencing court

is reproduced in the opinion of the court of appeals (Pet. App. 4456 n.1). The exchange at allocution shows that the district court considered petitioner's failure to admit guilt only as a factor relevant to the possibility of ameliorating the sentence on the basis of petitioner's potential for rehabilitation. Several courts of appeals have indicated that a sentencing judge may properly invoke his power to grant lenity to those who have admitted their criminal behavior. See, *e.g.*, *United States* v. *Garcia*, 544 F. 2d 681 (3d Cir. 1976); *United States* v. *Thompson*, 476 F. 2d 1196 (7th Cir.), cert. denied, 414 U.S. 918 (1973). The sentencing judge's refusal to impose a purely probationary sentence in the present case was an appropriate action in light of petitioner's failure to admit guilt. The six-month term of imprisonment imposed was well within the statutory limits for the offenses of which petitioner was convicted, and the sentencing court expressly stated that it regarded petitioner's sentence as lenient.

The asserted conflict between the decision below and other federal appellate decisions does not merit this Court's attention. In the first place, the other cases cited by petitioner are distinguishable on their facts. *United States* v. *Herron*, 551 F. 2d 1073 (6th Cir. 1977), involved a defendant's claim that the district court attempted to coerce him to plead guilty by threats of a maximum sentence if he went to trial. *LeBlanc* v. *United States*, 391 F. 2d 916 (1st Cir. 1968), and *Thomas* v. *United States*, 368 F. 2d 941 (5th Cir. 1966), stand for the proposition that a court cannot bargain with a defendant and use the threat of a maximum sentence to pressure a defendant to admit guilt during allocution. See also *United States* v. *Wright*, 533 F. 2d 214 (5th Cir. 1976); *Poteet* v. *Fauver*, 517 F. 2d 393 (3d Cir. 1975); *United States* v. *Rodriguez*,

498 F. 2d 302 (5th Cir. 1974). None of these cases holds that a sentencing judge may not under any circumstances consider failure to admit guilt. Moreover, the cases cited by petitioner, and other decisions suggesting possible impropriety in a sentencing court's consideration of a defendant's willingness or refusal to confess (*e.g.*, *Scott* v. *United States*, 419 F. 2d 264 (D.C. Cir. 1969)), all were decided before *Grayson*. No court of appeals has adopted such a position since *Grayson* was announced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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